No. 06-341

IN THE

Supreme Court of the United States

BCI COCA-COLA BOTTLING COMPANY
OF LOS ANGELES,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* FOOD MARKETING INSTITUTE IN SUPPORT OF PETITIONER

Of Counsel:

THOMAS J. WALSH, JR.
FORD & HARRISON LLP
795 Ridge Lake Boulevard
Suite 300
Memphis, TN 38120-9475
(901) 291-1500

ROBERT D. HALL, JR.
Counsel of Record
EDMUND J. MCKENNA
FORD & HARRISON LLP
101 East Kennedy Boulevard
Suite 900
Tampa, FL 33602-5133
(813) 261-7800

Counsel for Amicus Curiae

206810

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
The Standard Should Focus On Whether There Was Intentional Discrimination By The Authorized Decisionmaker, Including Whether There Was Either An Abdication Of Decisionmaking Responsibility To A Biased Subordinate Or A Deliberate Indifference To Possible Bias Where The Decisionmaker Knew Or Reasonably Should Have Known There Was A Substantial Likelihood Of Underlying Bias.	4
A. The Focus Should Be On the Actual Decisionmaking Agent.	6
B. Independent Investigations Should Not Be Widely Required.	10
C. Absent the Actual Decisionmaker's Own Bias, the Employer's Liability Should Turn on a Showing of Intentional Discrimination due to "Deliberate Indifference" to Underlying Bias of which the Decisionmaker Knew or Reasonably Should Have Known.	13
CONCLUSION	18

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

Ambramson v. William Patterson Coll. of N. J., 260 F.3d 265 (3d Cir. 2001) 10

Bender v. Hecht's Department Stores, 455 F.3d 612 (6th Cir. 2006) 14

Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998) 6, 7, 14, 15, 19

City of Canton v. Harris, 489 U.S. 378 (1989) 14

EEOC v. BCI Coca-Cola Bottling Co., 450 F.3d 476 (10th Cir. 2006) 4, 5, 13

Eiland v. Trinity Hosp., 150 F.3d 747 (7th Cir. 1998) 10

Elrod v. Sears, Roebuck and Co., 939 F.2d 1466 (11th Cir. 1991) 11, 14

English v. Colorado Dep't of Corr., 248 F.3d 1002 (10th Cir. 2001) 8, 13

Forrester v. Rauland-Borg Corp., 453 F.3d 416 (7th Cir. 2006) 11, 14

Gee v. Principi, 289 F.3d 342 (5th Cir. 2002) 7, 10

Cited Authorities

	Page
Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277 (4th Cir. 2004) (*en banc*)	9
Jamison v. Wiley, 14 F.3d 222 (4th Cir. 1994)	14
Kendrick v. Penske Transp. Servs., Inc., 220 F.3d 1220 (10th Cir. 2000)	7, 13
Kolstad v. American Dental Ass'n, 527 U.S. 526 (1999)	7
Neiderlander v. American Video Glass Co., 80 Fed. Appx. 256, 2003 U.S. App. LEXIS 22745 (3d Cir. 2003)	17
Ottman v. City of Independence, 341 F.3d 751 (8th Cir. 2003)	14
Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)	7
Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000)	6, 8, 17, 19
Russell v. McKinney Hosp. Venture, 235 F.3d 219 (5th Cir. 2000)	8
Shager v. Upjohn Co., 913 F.2d 398 (7th Cir. 1990)	7-8

Cited Authorities

Page

Stacks v. Southwestern Bell Yellow Pages, 27 F.3d 1316 (8th Cir. 1994) 10

Stimpson v. City of Tuscaloosa, 186 F.3d 1328 (11th Cir. 1999), *cert. denied*, 529 U.S. 1053 (2000) .. 8, 9

Waters v. Churchill, 511 U.S. 661 (1994) 16, 17

Willis v. Marion County Auditor's Office, 118 F.3d 542 (7th Cir. 1997) 12

FEDERAL STATUTES

42 U.S.C.§ 1983 14

42 U.S.C. §§ 2000e *et seq.* ("Title VII") 1, 4

42 U.S.C. § 2000e-2(a) 6

42 U.S.C. § 2000e(b) 6

MISCELLANEOUS

EEOC report on "Federal Sector Investigations Time and Cost" 12

INTEREST OF AMICUS CURIAE

The Food Marketing Institute (FMI), headquartered in Virginia, conducts programs in research, education, industry relations, and public affairs on behalf of 1,500 member food retail and wholesale companies. Its members operate approximately 26,000 retail food stores and include multi-store chains. In this context of decentralized retail operations, FMI provides programs and information on human resources ("HR") management, recruitment and retention, training and development, diversity, and compensation and benefits. FMI submits this brief in support of Petitioner BCI Coca-Cola Bottling Company of Los Angeles because FMI's members wish to understand and effectively implement all non-discrimination and equal opportunity laws and principles in the workplace, and are faced with conflicting court interpretations on "cat's paw" liability for HR decisions.[1]

The standard the Tenth Circuit propounds in this case, as to whether any report or matter considered by an HR decisionmaker came from a biased source and "caused" the HR professional's decision, will generate uncertainty in daily workplace decisions. It will also significantly expand the liability of employers who, in the spirit of Title VII, 42 U.S.C. §§ 2000e *et seq.*, seek to provide an unbiased decisionmaking process. This is not what Congress intended. Similarly, requiring employers routinely to conduct independent investigations in order to avoid "cat's paw" liability would

---

[1] No counsel for a party authored any part of this brief and no person or entity other than FMI, its members, or its counsel made any monetary contribution to the preparation or submission of the brief. The parties have consented to the filing of this brief and their consent letters are being lodged herewith.

far exceed what Title VII requires and would demand resources which are simply unavailable and unworkable.

This Court should formulate a clear and consistent rule that comports with Title VII's protection against intentional discrimination by the employer, and that encourages the development of policies and procedures which deter discrimination. Employers should be judged on whether their authorized decisionmakers intentionally discriminate, not on allegations that something in the process may have unknowingly affected a decision by an authorized and unbiased HR professional.

SUMMARY OF ARGUMENT

Based on Title VII's statutory language and on principles which this Court has set forth in prior rulings in Title VII and analogous cases, FMI urges this Court to adopt the following rule:

Liability for an adverse employment decision under Title VII should only attach where the plaintiff can meet his or her burden of proving that the adverse employment decision was the result of intentional discrimination, specifically, because the *actual decisionmaker* either (1) personally acted out of discriminatory intent; or (2) knew or reasonably should have known that there was a substantial likelihood of discrimination and was deliberately indifferent to such bias. The actual decisionmaker may be a decisionmaker formally authorized by the employer or one to whom the formally authorized decisionmaker has effectively delegated to another the authority to decide. Whether deliberate indifference exists should be measured by the actual decisionmaker's course of action in making

the decision once he or she actually knew or should have known that what was reported was likely infected with discriminatory bias.

In enacting Title VII, Congress intended to protect employees from intentional discrimination by an "employer." This requires the plaintiff to prove intentional discrimination and a judicial factfinder to view facts as they appeared to the authorized decisionmaker at the time the decision was made.

An employer's decision to limit the authority to take tangible employment actions to trained, unbiased officials serves Title VII's deterrent purposes. Consistent with this Court's holdings, "cat's paw" liability should be very limited. By permitting honest but incorrect decisions, Title VII precludes requiring (as the Tenth Circuit's rule would do) the employer to prove that it conducted an independent investigation in virtually every case in order to avoid "cat's paw" liability. In many circumstances, an independent investigation is unnecessary for an independent evaluation and decision, and the cost of having to conduct such an investigation for all personnel decisions would be prohibitive. Imposing such a requirement gives insufficient weight to the employer's legitimate interest in efficient decisionmaking, an interest this Court has recognized in analogous situations.

ARGUMENT

THE STANDARD SHOULD FOCUS ON WHETHER THERE WAS INTENTIONAL DISCRIMINATION BY THE AUTHORIZED DECISIONMAKER, INCLUDING WHETHER THERE WAS EITHER AN ABDICATION OF DECISIONMAKING RESPONSIBILITY TO A BIASED SUBORDINATE OR A DELIBERATE INDIFFERENCE TO POSSIBLE BIAS WHERE THE DECISIONMAKER KNEW OR REASONABLY SHOULD HAVE KNOWN THERE WAS A SUBSTANTIAL LIKELIHOOD OF UNDERLYING BIAS.

The Tenth Circuit's decision in *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476 (10th Cir. 2006), significantly enlarges the scope of employer liability under Title VII, 42 U.S.C. §§ 2000e *et seq.*, for personnel decisions HR officials make every day. Congress did not intend this result when it enacted Title VII.

In *BCI* the company sought to comply with the law by authorizing a trained HR official, rather than lower level persons, to make termination decisions. The HR official, who "alone, made the formal termination decision" clearly was not biased against the plaintiff, as she "did not even know that he was black." *Id.* at 491.

Viewing the facts as they appeared to the HR official at the time, as the law requires be done, there was no reason whatsoever for the sole decisionmaker to suspect race discrimination or to launch an independent investigation. Yet the court ordered the case to trial because the HR official, who (quite logically) saw no need to conduct an independent

investigation, relied on a report from a subordinate who was later portrayed in the lawsuit as biased. The court so held even though the subordinate "was not authorized to discipline or terminate anyone." *Id.* at 478.[2]

The consequence of the Tenth Circuit's rule, if upheld, would be that a responsible HR decisionmaking official could no longer ask in an honest and straightforward manner what logical conclusions he or she as an experienced professional should draw from the circumstances presented, as the law now requires. Rather, the official would have a legal duty to ask affirmatively whether the employee belongs to any of several protected categories, and if so, then to probe further whether anyone could allege bias against one or more reporting subordinates.

This means that the HR official must be prepared to go to the time and expense of a full independent investigation before every decision, even absent any reason to suspect discrimination.[3] If the HR official chooses instead to rely on what is reported in the ordinary course of business, the official

---

[2] Notably, if the HR official *had* gone to the time and expense of an independent investigation and had interviewed the plaintiff-employee, there would have been, as there very often are, disputes as to the report of the alleged insubordinate conversation in question. Thus, regardless of any independent investigation, upon a decision to terminate, under the Tenth Circuit rule the plaintiff could nevertheless claim that the subordinate's report "caused" the termination.

[3] For example, the HR official would have to probe each item considered: Is this report accurate and unbiased? What about the prior disciplinary action in the file? What about that evaluation? What do other co-workers, even those uninvolved in the situation, think of the reporting subordinate?

runs the risk that a judge or jury will second-guess this approach based on factors unknown to the decisionmaker at the time — undisclosed matters such as an employee's characteristics, bias allegations, and other circumstances. Also, if the responsible HR official personally interviews the charged employee but deems the reporting employee more credible as to disputed facts, the official must face the unsettling reality that a jury will actually decide that question.

For a relatively small company with limited resources, or a large one with thousands of employees, these requirements would present a heavy burden. They are inconsistent with Title VII, and they would generate huge costs, much uncertainty, and unwarranted liability.

A. The Focus Should Be On the Actual Decisionmaking Agent.

Under Title VII, the prohibition against intentional employment discrimination runs against "an employer," 42 U.S.C. § 2000e-2(a), defined to include "any agent," § 2000e(b). The plaintiff has the ultimate burden of proving that the employer intentionally discriminated against the plaintiff. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000). As this Court held in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), a "tangible employment action in most cases inflicts direct economic harm." *Id.* at 762. Generally, only a "person acting with the authority of the company [] can cause this sort of injury," because a "tangible employment decision requires an official act of the enterprise, a company act." *Id.*

Typically, an allegation of a discriminatory tangible employment action calls into question the motives of the

person the company authorized to make the decision. "[A] challenge of pretext requires us to look at the facts as they appear to the person making the decision to terminate plaintiff." *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1231 (10th Cir. 2000). The "focus is on the final decisionmaker" because the "statements and actions of ordinary employees are normally not imputable to the employer." *Gee v. Principi*, 289 F.3d 342, 346 (5th Cir. 2002), following *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring) ("statements by nondecisionmakers . . . [do not] suffice to satisfy the plaintiff's burden . . .").

As this Court has recognized, Title VII is designed to encourage the creation of anti-discrimination policies and procedures, and to the extent limiting employer liability encourages employees to report problems through the use of such procedures, such a limitation of liability serves Title VII's deterrent purpose. *Ellerth*, 524 U.S. at 764. Agency concepts must be adapted to Title VII's practical objective of encouraging employers to implement policies to prevent discrimination. *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 544-545 (1999). Thus an employer's policy of allowing only trained, unbiased HR professionals to take tangible employment actions is one that effects the deterrent purpose of the statute and should be encouraged.

However, as noted in *Ellerth*, procedures for review of decisions by higher level supervisors may nevertheless result in "cat's paw" liability where the responsible decisionmaker abdicates his responsibility, such as by serving only as a "rubber stamp," as in the cited case of *Shager v. Upjohn Co.*,

913 F.2d 398, 405 (7th Cir. 1990).[4] In *Shager*, the review committee's considerations of a recommended termination were so "brief, perhaps perfunctory" that no one even remembered having considered the decision. *Id.* at 405. Similarly, in *Reeves*, judgment as a matter of law for the employer was denied where the subordinate's recommendation was "principally responsible" for the decision and he was the "actual decision-maker," married to the formal decision-maker. *Reeves*, 530 U.S. at 151-152.[5]

A number of courts have articulated the "cat's paw" test as requiring at least a recommendation by a biased subordinate, which the decisionmaker followed. *See, e.g., Stimpson v. City of Tuscaloosa*, 186 F.3d 1328, 1332 (11th Cir. 1999), *cert. denied*, 529 U.S. 1053 (2000); *English v. Colorado Dep't of Corr.*, 248 F.3d 1002, 1011 (10th Cir. 2001). Where there is a recommendation, an issue remains as to the degree of independent evaluation by the decisionmaker and the weight he or she accorded the recommendation. In addition, the plaintiff should still have

---

[4] The opinion below cites the *Shager* opinion by Judge Posner as the inaugural "cat's paw" decision.

[5] Some of the confusion and division over the proper standard, which the Tenth Circuit perceived, stems from excessive focus on *terminology* in other decisions, rather than on *de facto* decisionmaking status. For example, the Tenth Circuit rejected as too lenient the approach which the Fifth Circuit adopted in *Russell v. McKinney Hosp. Venture*, 235 F.3d 219 (5th Cir. 2000), which referred to whether the subordinate "possessed leverage, or exerted influence, over the titular decisionmaker." *Id.* at 227. In *Russell*, however, the subordinate actually "was the *de facto* decisionmaker," the CEO's son who took advantage of that power, telling the plaintiff she would lose her job over friction, then later issuing an ultimatum to the formal decisionmaker to terminate her. *Id.* at 228.

to prove that "the discriminatory animus behind the recommendation, and not the underlying employee misconduct identified in the recommendation," caused the decision. *Stimpson*, 186 F.3d at 1332. But where (as here) there is no recommendation, there is no evidence that the subordinate desired or supported the action taken and no basis to impute the decision to the subordinate.

In this case the Tenth Circuit correctly rejected a standard that would impute liability for merely reporting factual information, or providing input, or having influence that may have affected the decision. A subordinate who provides a report or input does not know, or have control over, what the actual decisionmaker will review, evaluate or decide. As held in *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277 (4th Cir. 2004) (*en banc*), the standard should focus on actual decisionmakers. The court reasoned that there is no precedential or practical basis "to expand the contours of the acts – by embracing a test that would impute the discriminatory motivations of subordinate employees having no decisionmaking authority to the employer . . . simply because they have influence or even substantial influence in effecting a challenged decision." *Id.* at 291.[6]

At issue here is whether the employer is guilty of intentional discrimination where the authorized decisionmaker deliberated and decided in an unbiased manner. The standard properly should focus on persons authorized to act as decisionmakers, and who in fact evaluate and decide the matter. In this situation, if the subordinate

---

[6] In *Hill*, the fact that the subordinate was in the position to make reports and initiate the decisionmaking process was held insufficient. *Hill*, 354 F.3d at 297.

does not make, or participate in, actual decisionmaking, but rather only reports information without making the decision on how it will be used or what else will be considered, the employer's decision is not intentionally discriminatory, and liability should not be imputed from an alleged biased report.[7] Where, as in the case below, the authorized decisionmaker did not abdicate her responsibility and rendered an honest, unbiased decision, liability should not be imputed from reports of subordinates based on a "cause" theory.

B. Independent Investigations Should Not Be Widely Required.

The concept discussed by the Tenth Circuit that an employer must prove that an independent investigation was conducted to avoid "cat's paw" liability conflicts with well established Title VII principles on the plaintiff's burden of proof. Thus, for example:

> [A]s we have said countless times, the question in a discrimination case is not whether the employer's stated nondiscriminatory ground for the action of which the plaintiff is complaining is correct but whether it is the true ground of the

---

[7] *Compare Eiland v. Trinity Hosp.*, 150 F.3d 747, 752-53 (7th Cir. 1998) (decisionmaker "honestly believed her reasons") *with Ambramson v. William Patterson Coll. of N. J.*, 260 F.3d 265, 286 (3d Cir. 2001) (decisionmaker sought counsel of subordinate in making decision who "participated in the decision to terminate"); *Stacks v. Southwestern Bell Yellow Pages*, 27 F.3d 1316, 1323 (8th Cir. 1994) (subordinate "admitted that he participated in the decisions to suspend and terminate"); *Gee*, 289 F.3d at 347 & n.4 (negative comments in meeting created a general consensus and resulted in a decision that "was already made").

> employer's action rather than being a pretext for a decision based on some other, undisclosed ground.

Forrester v. Rauland-Borg Corp., 453 F.3d 416, 417 (7th Cir. 2006) (Posner, J.). Thus, the Seventh Circuit noted that if the complaint against the plaintiff "had been a pure fabrication, with 'no basis in fact' whatsoever – yet it was believed by the employer and it was that belief and nothing else that caused him to fire the plaintiff . . . [t]here would be nothing pretextual about his action. A pretext, to repeat, is a deliberate false-hood." *Id.* at 419. *See also Elrod v. Sears, Roebuck and Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991) ("We can assume for purposes of this opinion that the complaining employees interviewed by Rives were lying through their teeth. The inquiry . . . is limited to whether Rives, Malone and Merrill believed that Elrod was guilty of harassment, and if so, whether this belief was the reason behind Elrod's discharge.").

An independent investigation is, of course, evidence of an independent evaluation and decision by the decisionmaker. That does not mean, however, that the considerable time and expense of an independent investigation is required to render an independent decision. For example, evaluations may often involve a review of objective file data (absences, tardies, prior discipline) and rules without the need for an independent investigation and interviews.

Where complaints of discrimination against a subordinate already have been made by the time of the decision, an independent investigation, including an interview of the employee, provides evidence of an independent evaluation in the face of the discrimination

allegations. *See Willis v. Marion County Auditor's Office*, 118 F.3d 542, 547-548 (7th Cir. 1997) (decisionmaker knew of discrimination charges and independently reviewed final violation). However, even in that circumstance, the lack of an independent investigation does not mean that an independent decision was not reached, where the alleged biased subordinate is not a *de facto* decisionmaker and did not participate in the decision.

Looking at it through the eyes of an HR decisionmaker as required, in the absence of complaints or allegations of discrimination against a reporting subordinate, there would be no apparent need for investigation to ascertain the possibility of bias. Independent investigations for all reports requiring personnel action would obviously involve tremendous expenditures of time and money. For example, in the Equal Employment Opportunity Commission's (EEOC) report on "Federal Sector Investigations Time and Cost," the EEOC reports that over an 11-year period, the cost for federal agencies to conduct investigations of federal sector equal employment opportunity complaints was $387.5 million, with an average cost of $2,418 per investigation. Extending such costs to all reported matters, even where no EEO complaint or discrimination allegation against a subordinate has been made, is completely unwarranted and beyond any conceivable requirement of Title VII.

Moreover, conducting an independent investigation would not avoid litigation and possible liability under the Tenth Circuit's "cause" standard. The Tenth Circuit approach would allow the plaintiff-employee to pursue a theory that a mere "report" which is discriminatory (not rising to the level of a recommendation, which the Tenth Circuit held unnecessary for liability to attach) "caused the adverse

employment action," *BCI*, 450 F.3d at 487, because a biased subordinate was guilty of "selectively reporting or even fabricating information in communications with the formal decisionmaker," *id.* at 486. While the Tenth Circuit stated that an employer can avoid liability by conducting an independent investigation or simply asking an employee for his version of events, the cases cited by the Tenth Circuit involved only situations where the employee refused the opportunity to respond in the investigation, precluding him from later challenging his employer's reliance on reported information.[8] Thus, the Tenth Circuit's "cause" standard would nevertheless appear to allow claims for liability to proceed even where an independent investigation was conducted, if the employee responded and simply disputed the underlying reports as biased and fabricated.

C. Absent the Actual Decisionmaker's Own Bias, the Employer's Liability Should Turn on a Showing of Intentional Discrimination due to "Deliberate Indifference" to Underlying Bias of which the Decisionmaker Knew or Reasonably Should Have Known.

Where there is a procedure for the HR official to consider the reported information and to make an honest decision upon his/her belief as to what is warranted, a plaintiff-employee should not be able to circumvent that decision simply by

---

[8] *See Kendrick, supra* (no "cat's paw" liability where center manager investigated incident and plaintiff declined opportunity to give his version prior to discharge by HR manager based on report); *English v. Colorado Dept of Corr.*, 248 F.3d 1002 (10th Cir. 2001) (no "cat's paw" liability for biased investigation where decision-making official held meetings with plaintiff who refused the opportunity to respond and rebut).

later alleging that it was "caused" by a subordinate's biased report. As this Court recognized in *Ellerth*, conduct taken for personal motives is not subject to *respondeat superior* liability. *Ellerth*, 524 U.S. at 757, 759 (*citing, Jamison v. Wiley*, 14 F.3d 222, 237 (4th Cir. 1994) (unfair criticism of job performance by supervisor resulted from personal motives and was not subject to *respondeat superior* liability)).

In other civil rights contexts, where *respondeat superior* liability is not applicable to impute liability for a subordinate's action, a supervisor incurs liability for a violation where the supervisor is personally involved in a violation or "deliberately indifferent" to whether a violation occurred. *See Ottman v. City of Independence*, 341 F.3d 751, 761 (8th Cir. 2003) (supervisor was not deliberately indifferent to claim of sexual harassment where he met with alleged perpetrator, even if his actions proved ineffectual).[9]

---

[9] This Court formulated the "deliberate indifference" standard in *City of Canton v. Harris*, 489 U.S. 378, 388-389 (1989), where *respondeat superior* liability was inapplicable under 42 U.S.C. § 1983, the employer had valid policies, and liability depended on a deliberate action by the employer resulting in the violation of rights of persons dealing with its employees. This Court developed the standard to avoid unprecedented liability, whereby, in virtually every instance, a plaintiff would be able to point to something further that could have been done and courts would engage in endless exercises of second-guessing. Similarly, under Title VII, employer liability for the decision depends on whether it was intentional discrimination and a deliberate falsehood; *see Forrester*, 453 F.3d at 419, and the law is well established that courts may not act as "super personnel departments" and second guess business decisions. *See, e.g., Bender v. Hecht's Dep't Stores*, 455 F.3d 612, 628 (6th Cir. 2006); *Elrod*, 939 F.2d at 1470.

Likewise, in *Ellerth*, this Court held that when a supervisor takes no tangible employment action but there is an issue that the supervisor engaged in discriminatory conduct (there, harassment), the employer can defend against that discrimination by showing that it exercised reasonable care, such as promulgation of an anti-discrimination policy and complaint procedure, and that the employee unreasonably failed to take advantage of the procedure. *Ellerth*, 524 U.S. at 765. Employer liability is triggered when the employer "knew or should have known about the conduct" and failed to stop it. *Id.* at 759.

Anti-discrimination policies with complaint procedures are common among thousands of American businesses and governmental agencies. In these circumstances, employees have the ongoing opportunity to raise any concerns they have about possible discrimination. Absent discrimination allegations against the reporting subordinate which were "known or should have [been] known," and absent deliberate indifference by the decisionmaker, there is no basis to suggest that an evaluation and decision by an HR professional was a deliberate act of intentional discrimination of the employer.

Where a company provides valid anti-discrimination policies and complaint procedures and limits authorized decisionmaking to responsible professionals, a subsequent allegation of a reporting subordinate's bias unknown to the company when making the decision should not be used to impute liability to the company. Rather, such policies and procedures should be encouraged because they serve Title VII's deterrent purpose. Liability to the employer for intentional discrimination should be imputed only where the formal decisionmaker abdicates his or her responsibility or is deliberately indifferent to whether bias exists where he or

she knew or should have known of the likelihood of bias in the process.

In *Waters v. Churchill*, 511 U.S. 661, 668 (1994), a First Amendment protected speech case, at issue were disputed versions of the plaintiff's statements, which were reported to be negative toward the administration and which led to the plaintiff's discharge. This Court vacated the Seventh Circuit's holding that if the employer discharges the employee as a result of an insufficient investigation as to whether the speech was protected, "the employer runs the risk of eventually being required to remedy any wrongdoing whether it was deliberate or accidental." *Id.* at 667-668 (citations omitted). This standard gave "insufficient weight to the government's interest in efficient employment decisionmaking." *Id.* at 675. As the Court recognized:

> [E]mployers, public and private, often do rely on hearsay, on past similar conduct, on their personal knowledge of people's credibility, and on other factors that the judicial process ignores. Such reliance may sometimes be the most effective way for the employer to avoid future recurrences of improper and disruptive conduct. What works best in a judicial proceeding may not be appropriate in the employment context. If one employee accuses another of misconduct, it is reasonable for a government manager to credit the allegation more if it is consistent with what the manager knows of the character of the accused. Likewise, a manager may legitimately want to discipline an employee based on complaints by patrons that the employee has been rude, even though these complaints are hearsay.

Id. at 676.

This Court in *Waters* found that (unlike under Title VII) a government manager who honestly believes that speech is unprotected can nevertheless violate the First Amendment if the speech is protected. *Id.* at 669. The Court held that a manager could be held to the standard of "care that a reasonable manager would use before making an employment decision" in a situation where "**a reasonable supervisor would recognize that there is a substantial likelihood that what was actually said was protected.**" *Id.* at 677-678 (emphasis added). The Court emphasized that "many different courses of action will necessarily be reasonable" in situations where there could be reasonable disagreement about who is to be believed, or how much investigation needs to be done, or how much evidence is needed to come to a particular conclusion. *Id.* at 678.

As applied here,[10] first, *Waters* spoke of a duty of reasonable care being triggered where there was a reasonable basis for recognizing that there existed a "substantial likelihood" that legal protections (here, against bias) were in play. Second, under *Waters*, a violation could be based upon an unintentional, but erroneous and unreasonable belief. *Id.* at 678-679. Under Title VII, by contrast, the plaintiff has the ultimate burden of proving he or she has been the victim of "intentional discrimination." Rejection or disbelief of the employer's explanation does not itself suffice. Rather, the factfinder must believe the plaintiff's explanation of intentional discrimination in order for liability to attach. *Reeves*, 530 U.S. at 147. Accordingly, a Title VII plaintiff should have to show that the decision was the result of

---

[10] *See Neiderlander v. American Video Glass Co.*, 80 Fed. Appx. 256, 259, 2003 U.S. App. LEXIS 22745 (3d Cir. 2003), applying *Waters* in a Title VII case.

intentional discrimination because the unbiased decisionmaker (1) knew or reasonably should have known that there was a substantial likelihood of discrimination, and (2) was intentionally or deliberately indifferent to the likelihood of discrimination. The taking of any of the different courses of action available which could be considered reasonable where reasonable disagreement about an investigation exists would preclude liability.

As applied to the instant case, Ms. Edgar evaluated the matter and made the termination decision without any bias. Mr. Grado was not authorized to terminate and, while he made a report, he did not know, influence, or control what Ms. Edgar would review, evaluate, or decide. There had been no complaints that Mr. Grado was biased, and there was no reason for Ms. Edgar to suspect discrimination or to conduct an independent investigation. Ms. Edgar was not deliberately indifferent to whether bias occurred, as she did not know, nor could she have known, that the reporting subordinate was biased. Accordingly, there was no basis to find liability as to the company.

CONCLUSION

A test as to whether any report of an alleged biased subordinate "caused" the action would impute much uncertainty and unwarranted liability to an employer who provides an independent decisionmaking process. Similarly, any rule that effectively imposes a blanket requirement of an independent investigation goes far beyond what Title VII requires, which is simply an honest, even if incorrect, decision. HR professionals and their employers simply do not have the resources to conduct independent investigations

every time a decision needs to be made, and nothing in the law imposes such an extreme requirement. The Court should continue to focus, as it did in *Ellerth* and *Reeves*, on the actual decisionmaker and should not enlarge the contours of liability by making the employer responsible for any action that "caused" a decision independently rendered in an honest fashion. Consistent with Title VII's requirement of intentional discrimination and with principles this Court has set forth in prior cases, the plaintiff's burden should be to show that the decision was the result of intentional discrimination because either the decisionmaker abdicated the responsibility to make the decision to the subordinate, or there was a reasonable basis to question the report (as biased), and the decisionmaker was deliberately indifferent to that information.

Respectfully submitted,

ROBERT D. HALL, JR.
Counsel of Record
EDMUND J. MCKENNA
FORD & HARRISON LLP
101 East Kennedy Boulevard
Suite 900
Tampa, FL 33602-5133
(813) 261-7800

Of Counsel:

THOMAS J. WALSH, JR.
FORD & HARRISON LLP
795 Ridge Lake Boulevard
Suite 300
Memphis, TN 38120-9475
(901) 291-1500

Counsel for Amicus Curiae